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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

CITY OF MORRISTOWN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	6
A. The Changing Circumstances	7
B. "Fair and Reasonable" Today	11
Conclusion	13

TABLE OF AUTHORITIES

CASES:

American Trucking Ass'n v. *United States*, 252 F. Supp. 597 (D. D.C. 1965), *aff'd*, 382 U.S. 373 ..... 11n.

Atchison, Topeka & Santa Fe Ry. Co. v. *Public Utilities Comm. of California*, 346 U.S. 346 (1953) 2, 6, 10, 11, 12

Chicago, B. & Q. R.R. Co. v. *Chicago*, 166 U.S. 226 (1897) 8

City of Gainesville v. *Southern Ry. Co.*, 423 F.2d 588 (5th Cir. 1970) 13

City of Winston-Salem v. *Southern Ry. Co.*, 248 N.C. 637, 105 S.E.2d 37 (1958) 9

Denver & R.G. R.R. Co. v. *City and County of Denver*, 250 U.S. 241 (1919) 8

In re Existing Highway-Railroad Crossings at Grade, 251 App. Div. 72, 295 N.Y.S. 831 (1937) 9

Lehigh & New England R. Co. v. *Public Service Comm.*, 126 Pa. S. 565, 191 Atl. 380 (1937) 9

Nashville, C. & St. L. Ry. v. *Walters*, 294 U.S. 405 (1935) 6, 7, 8, 10, 11, 12, 13

New York & N.E. R.R. Co. v. *Bristol*, 151 U.S. 556 (1894) .. 8

State ex rel. Wabash Ry. Co. v. *Public Service Comm.*, 340 Mo. 225, 100 S.W.2d 522 (1936) 9

Page

STATUTES:

Federal Aid Highway Act of 1944, Ch. 626, 58 Stat. 841; 23 U.S. Code, Sec. 130 10
28 U.S.C. Sec. 1254(1) 2
Act of June 16, 1933, ch. 90, § 204, 48 Stat. 195 8
City of Morristown:
Ordinance No. 1813 (Aug. 4, 1970) 2, 3

MISCELLANEOUS:

Federal Railroad Administration, Dept. of Transportation, a Program Definition Study for Rail-Highway Grade Crossing Improvements (October 1969) ..... 7n.
Prevention of Rail-Highway Grade Crossing Accidents, 322 I.C.C. 1 (1964) 10
Harvard Law Review Note, 26 Harv. L. Rev. 169 (1913) 8

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above case.

OPINIONS BELOW

The memorandum opinions of the District Court filed on June 30, 1970 and November 18, 1970 are not reported, but are reproduced in the appendix (pp. 10a, 13a). The opinion of the Court of Appeals dated September 22, 1971, which is reproduced in the appendix (p. 1a-9a) is reported at 448 F.2d 288.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on September 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

Whether, under the circumstances of this case, it was "fair and reasonable" within the rule of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Public Utilities Comm. of California,* 346 U.S. 346, 352, for respondent City to assess against Southern 100 per cent of the costs of installing and maintaining crossing safety devices at each of three rail-street crossings in said City.

STATUTE INVOLVED

Ordinance No. 1813 of the City of Morristown, ordained on August 4, 1970, is set out in the appendix to this petition (p. 17a).

STATEMENT

This action began when petitioner Southern Railway Company (hereafter Southern) filed a complaint seeking declaratory and injunctive relief against an ordinance of respondent City of Morristown (hereafter the City) which required Southern to install and maintain, solely at its own expense, automatic electric signal devices and crossing gates at three rail-street crossings in the City. The complaint asserted that, under the circumstances, the ordinance constituted a taking of Southern's rights and property in violation of the Fifth and Fourteenth Amendments.

Following a pre-trial stipulation of facts, the District Court granted Southern's motion for summary

judgment, stating that "unless the defendant's legislative body sets forth in the body of its enactment its considered findings" (App., p. 12a) the court is unable to determine whether the allocation of 100 per cent of the costs to Southern was reasonable. Thereafter the City ordained Ordinance No. 1813 as an amendment in the nature of a substitute for the earlier ordinance which had precipitated this litigation. The only change made by Ordinance 1813 was to add certain "determinations and findings" (App. pp. 17a-20a). Both parties again moved for summary judgment, and the City's motion was granted.

The stipulated facts may be summarized as follows:*

Southern's right-of-way through Morristown was acquired from the State of Tennessee in 1854, a year before Morristown itself was incorporated (Jt. App. 11). Its main line now crosses 19 public streets, of which 9 are already equipped with automatic signals installed and maintained by Southern (Jr. App. 11). Train speeds in the City are limited by ordinance to a maximum of 20 miles per hour (Jt. App. 13, 21). Four trains—formerly six—pass through Morristown each 24 hours, and there are two switching operations daily (Jt. App. 14, 42).

Before Ordinance No. 1813 was adopted, the City Council asked the City Administrator and the City Attorney to investigate and recommend to the Council which additional crossings should be equipped with automatic signals. Six were recommended, but the

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* A copy of the joint appendix in the court below, which contains the stipulation (Jt. App. 11-17, 42), is being lodged with the Clerk.

Council reduced it to three. No hearings were held prior to the ordinance's adoption (Jt. App. 12-13).

The three crossings at which the ordinance requires automatic signals are at Fairmont Street, at High Street and at Industrial Avenue. In 1969, a traffic count showed 3,668 vehicles using the High Street crossing and 4,200 using the Fairmont Street crossing, in an 11½ hour daytime period (Jt. App. 16). Industrial Avenue is the main access road to Morristown Industrial Park, which has nine industries; 1,579 vehicles used this crossing during the same period (Jt. App. 16). Each of the crossings now has the warning signal required by Tennessee law, and at each of them the driver of a vehicle has unobstructed vision, 15 feet from the nearest rail, of more than 1000 feet in each direction (Jt. App. 13, 15). The 15-foot measure contained in the stipulation reflects the requirement of a City ordinance that the driver of a motor vehicle stop not less than 15 feet from the track when a train is approaching (Jt. App. 24-25). The City stipulated, however, that the ordinance had never been enforced; when the traffic count was made, only 1.5 per cent of the motor vehicles actually stopped for the crossings (Jt. App. 13, 14).

During the last 10 years there have been five accidents at the Fairmont Street crossing, resulting in payments by Southern of $80,820; five accidents at the High Street crossing, with payments of $371,461.05; and one minor accident at the Industrial Avenue crossing, with no payment (Jt. App. 16). During the last five years there have been five accidents at signalled crossings in the City (Jt. App. 16).

Morristown has a population of about 25,000 in a county with a population of almost 40,000 (Jt. App.

12). Motor vehicle registration in the county has increased from 7,500 in 1960 to 25,500 in 1970 (Jt. App. 16). There are 55 industries in the City, which operate almost 900 trucks, with three truck terminals. A substantial portion of the vehicles using the three crossings in question are trucks—10 per cent at High Street, 14 per cent at Fairmont Street, and 27 per cent at Industrial Avenue (Jt. App. 12, 14).

Southern is the second largest taxpayer in the county; its bills for the 1967-1969 period were $188,000, $111,550.01 and $98,901.61. It paid taxes to the City during the same period of $22,698.38, $23,036.44 and $25,714.39 (Jt. App. 14-15). Overall, Southern paid approximately 21 per cent of its gross revenues in real property taxes and maintenance of right of way. Truck transporters, in contrast, paid 7 per cent of gross revenues for property, road use and fuel taxes and registration fees (Jt. App. 15).

The cost of complying with the ordinance, at each crossing, is estimated at $16,900 for installation of the required automatic signals, and $1,200 each year for its maintenance (Jt. App. 15).

The District Court's second opinion, holding it reasonable to assess 100 per cent of the costs of the signals at each of the three crossings against Southern, referred to the volume of traffic across each crossing, the danger at two of the crossings due to a partially obstructed view, the amount that Southern has paid in judgments, and the amount the City had spent in constructing an overpass over Southern tracks in developing a new east-west traffic artery (App. 14a-15a).

The Court of Appeals, in affirming, stated that the facts "do not suggest that Southern has been dealt

with arbitrarily or in unreasonable fashion" (App. 7a). The basis for its conclusion is stated in one paragraph (App. 7a-8a):

> "The findings of the district court show that the crossings in question were hazardous and that the safety devices are necessary to protect the safety of both rail and highway travellers; that accidents at these crossings have resulted in considerable expense to Southern; that the improvement was necessary for public safety and convenience in light of the community's growth; and that the city had recently constructed an overpass in connection with a new east-west traffic artery at a cost of $200,000 which it bore entirely."

REASONS FOR GRANTING THE WRIT

One preliminary point must be stated. Southern has not sought, and does not now seek, to challenge in any way the judgment made by the City that signals should be installed at the three crossings here involved. We urged below, and we urge in this Court, only the invalidity of that part of Ordinance 1813 which assesses against Southern 100 per cent of the cost of installing and maintaining the signals.

Twice in the last half-century the Court has found it appropriate to consider the extent to which a railroad may properly be required to bear the burden of reducing the hazards of motor vehicle traffic over its right-of-way. In *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U.S. 405, the Court refused to approve, under the circumstances of that case, an assignment of 50 per cent of the cost to the railroad. In *Atchison, T. & S.F. Ry. Co.* v. *Public Utilities Comm. of California,* 346 U.S. 346, the Court approved, under quite different circumstances, an allocation to the rail-

road of 50 per cent of the cost. In each case, the Court made it clear that under the Constitution "there is the proper limitation that such allocation of costs [against the railroad] must be fair and reasonable." See 346 U.S. at p. 352.

"Fair and reasonable" is, of course, not susceptible of precise definition. Yet the phrase suggests, if indeed it does not require, not only that the courts consider all the circumstances, but also that what was "fair and reasonable" years ago may not be "fair and reasonable" today. So much was expressly stated in the *Walters* case. See 294 U.S. at pp. 414-415.

In the present case, the court below, while accepting the "fair and reasonable" limitation, has so applied it—or failed to apply it—as substantially to nullify the teachings of the decisions of this Court. Because the issue continues to arise frequently, and because of the burden on an already staggering railroad industry if the costs of achieving reductions in crossing hazards are not fairly distributed,* we respectfully urge the Court, now that almost two decades have elapsed since its last opinion, to review, and reverse, the decision below, and to restate, in the light of today's circumstances, the pertinent considerations of fairness and reasonableness.

A. The changing circumstances

Problems of crossing safety have existed since the first railroad was built. But even a summary statement of the changes that have occurred, both in the nature of the problem and in the legislative and judi-

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* See generally, Federal Railroad Administration, Dept. of Transportation, A Program Definition Study for Rail-Highway Grade Crossing Improvements (October 1969).

cial responses to its solution, will show the need for a contemporaneous evaluation of what is now fair and reasonable in assessing the share the railroad must pay in reducing crossing hazards.

Until well into the present century the idea of allocating to the public any of the costs of such safety measures scarcely existed. A 1913 Harvard Law Review note summarized the then law: ". . . since the railroad and not the highway use creates the danger, it is not unreasonable that the former rather than the latter should bear the cost of removing it." 26 Harv. L. Rev. 169, 170. The decisions of this Court reflected that approach. *E.g., New York & N.E. R.R. Co.* v. *Bristol,* 151 U.S. 556 (1894); *Chicago, B. & Q. R.R. Co.* v. *Chicago,* 166 U.S. 226 (1897); *Denver & R.G. R.R. Co.* v. *City and County of Denver,* 250 U.S. 241 (1919).

By the 1920's, however, there had developed an increasing recognition that it was unfair and unreasonable—and indeed impossible—to place on the railroads the entire cost of reducing crossing hazards. As the summary of state legislative provisions set out in the Appendix (pp. 21a-27a) will show, by that time a number of state statutes had modified the rule of virtual automatic total railroad responsibility reflected in the early cases, by setting a maximum on the share of costs that could be assigned to the railroads. Federal action followed in 1933, when $400 million was authorized to be granted to the States to pay "all or any part" of the costs of eliminating the hazards of highway-railroad crossings. Act of June 16, 1933, ch. 90, § 204, 48 Stat. 195.

Then, in 1935, the *Walters* decision of this Court provided an authoritative judicial recognition of the

changes that were taking place in the nature of the problem. In a typically detailed opinion refusing to approve even a 50 per cent statutory allocation of costs to the railroad, Mr. Justice Brandeis concluded: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." 294 U.S. at pp. 422-423. The changed circumstances were also reflected in state court decisions. Attempts to force an increase in the railroads' share of the cost of reducing the dangers of a highway crossing failed in *State ex rel. Wabash Ry. Co.* v. *Public Service Comm.*, 340 Mo. 225, 100 S.W.2d 522 (1936), and in *Lehigh & New England R. Co.* v. *Public Service Comm.*, 126 Pa. S. 565, 191 Atl. 380 (1937). The New York and North Carolina courts rebuffed attempts to assess 100 per cent of such costs to the railroads. *In re Existing Highway-Railroad Crossings at Grade*, 251 App. Div. 72, 295 N.Y.S. 831 (1937); *City of Winston-Salem* v. *Southern Ry. Co.*, 248 N.C. 637, 105 S.E.2d 37 (1958).

Perhaps even more dramatic recognition of the changing nature of the problem—and of what is now "fair and reasonable"—is the response of the state legislatures and the Congress. State after State has recognized that what might have been fair and reasonable in 1913 when the Harvard note was written, could no longer be so considered. We have set out in the Appendix the references to these laws. Some of them set a maximum beyond which railroad liability may not extend. *E.g.*, Kentucky, 10 per cent; Wyoming, 10 per cent; Oklahoma, 10-25 per cent; New Jersey, 5 per cent; Colorado, 10 per cent. See Appendix, pp. 22a-27a. A greater number provide for a case-by-case

analysis of each project, usually with an administrative hearing, to determine a proper allocation. Such was the California statute that was before this Court in the *Atchison* case in 1953. These laws, too, frequently add a maximum limit on railroad liability, to ensure that the old rule would not survive in another guise.

While the scope of Federal concern is more limited, Federal awareness of the change in circumstances has been equally clear. In the Federal Aid Highway Act of 1944, Congress fixed a 10 per cent maximum on the amount that could be allocated to the railroad in eliminating a crossing hazard on the Federal-aid highway system. Ch. 626, 58 Stat. 841; U.S. Code, Title 23, Sec. 130. And in 1964 the Interstate Commerce Commission, after extended hearings, fully concurred with the conclusion reached by this Court in the *Walters* decision. (*Prevention of Rail-Highway Grade-Crossing Accidents*, 322 I.C.C. 1.) The Commission's opinion stated (322 I.C.C. at p. 92):

> "In the past it was the railroad's responsibility for protection of the public at grade crossings. This responsibility has now shifted. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal."

The Commission found (*id.* at p. 87):

> "(13) That highway users are the principal recipients of the benefits flowing from rail-highway grade separations and from special protection at rail-highway grade crossings. For this reason the cost of installing and maintaining such separations and protective devices is a public responsi-

bility and should be financed with public funds the same as highway traffic devices." *

B. "Fair and reasonable" today

In the light of the above, the consideration of the "fair and reasonable" limitation by the court below cannot be reconciled with the principles enunciated by this Court in *Walters* and *Atchison*. In the relevant portion of its opinion quoted at page 6, *supra*, the court, first, refers to the fact that the three crossings are hazardous, and hence that the signals are necessary. As we have stated above, this is not in issue. Southern's challenge does not go to the need for the signals, but only to the extent of its proper responsibility in paying for them. On *that* issue, the existence of the hazard is irrelevant; the proper question is: who is responsible for it?

The court below ignored entirely the fact that responsibility does not lie entirely, or even principally, with Southern. The facts, indeed, exemplify the accuracy of this Court's conclusion in *Walters* that "the railroad has ceased to be the prime instrument of danger" (294 U.S. at p. 422). The ordinance itself recites that signals have become necessary because of "increased automotive traffic" at these crossings, particularly at Industrial Avenue, which crossing the City created only a few years ago and which leads to its recently established industrial park (App., pp. 17a, 19a). Indeed, the court below itself concludes that the signals were made necessary "in light of the com-

* The Commission, however, concluded that it had no jurisdiction to take action. This Court agreed. American Trucking Ass'n. v. United States, 242 F. Supp. 597 (D. D.C. 1965), *aff'd*, 382 U.S. 373.

munity's growth" (p. 6, *supra*). The stipulated facts and the "findings and determinations" of the ordinance show the huge increase in motor vehicle registration, the nature of the development of the city which has greatly increased automotive traffic at these crossings, and the consistent disregard by the motoring public of existing warnings (Jt. App. pp. 12, 16; App. pp. 17a-20a). They also make clear that no action by Southern has increased the hazard at these crossings; indeed, there are now fewer trains than formerly (Jt. App. pp. 14, 42).

The court below also refers (see p. 6, *supra*) to the fact that accidents at these crossings have resulted in considerable expense to Southern. The reference would be more significant had the ordinance been designed to benefit Southern, rather than the motoring public. It is true, of course, that Southern may benefit, though the stipulated facts reveal that accidents have occurred at crossings in the City already signalled (Jt. App. p. 16). Moreover, the court's comment overlooks entirely the fact that at one of the crossings where Southern is to erect and maintain signals—at Industrial Avenue—there has been *no* expense to Southern from accidents. Nothing in either *Walters* or *Atchison* suggests that "fair and reasonable" does not require a proper allocation as to each installation that is required.

Finally, the court below notes that the City, at its own expense, had erected an overpass in connection with a new arterial street. The relevance is doubtful, to say the least, but to the extent that other expenditures have any relevance, the City's is balanced by Southern's expenses in installing and maintaining signals at nine other crossings in the City.

Significantly, the court below made no reference to the dramatic change in the nature of the rail-street crossing problem—the change that has been recognized by this Court in *Walters,* by the legislatures of a majority of the States, by the Congress and by the Interstate Commerce Commission. It ignored most of the considerations relevant to fairness and reasonableness. *Cf. City of Gainesville* v. *Southern Ry. Co.,* 423 F.2d 588 (5th Cir. 1970). Its opinion can fairly be said to rest on the proposition that when automotive traffic has so greatly increased over three city crossings as to render them hazardous, it is "fair and reasonable" to charge the entire cost of measures to reduce those hazards to the railroad because the amount involved is less than the judgments against it over the past decade at two of them. "Fair and reasonable" *must* mean more than that.

CONCLUSION

We respectfully submit, therefore, that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

No. 71-1032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOUTHERN RAILWAY COMPANY, *Plaintiff-Appellant,*

v.

CITY OF MORRISTOWN, *Defendant-Appellee.*

APPEAL from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided and Filed September 22, 1971.

Before: PHILLIPS, Chief Judge, and McCREE and MILLER, Circuit Judges.

MILLER, Circuit Judge. This case involves a determination whether Ordinance Number 1813 (dated August 4, 1970) of the City of Morristown, Tennessee, requiring Southern Railway Company to install and maintain entirely at its own expense three automatic signals at street-railway crossings in the city is arbitrary and unreasonable in light of all the circumstances and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution.

The action was instituted by Southern in the United States District Court for the Eastern District of Tennessee, Northeastern Division, seeking a declaratory judgment declaring invalid Ordinance Number 1764 of the City

of Morristown (dated January 7, 1969), and temporary and permanent injunctive relief prohibiting its enforcement. Ordinance Number 1764 was essentially identical to the ordinance before us except that it contained no legislative findings. Following a pre-trial conference at which the parties stipulated facts, Southern moved for summary judgment. The District Court granted the motion, stating in its memorandum opinion and order (filed June 30, 1970):

> Although there is an implication in the *Gainesville* case, ibid., that the trial court is to make such findings, this Court is of the opinion that, (unless the gaps in the stipulated facts are supplied adequately) the factual considerations, which prompted the legislative body to allocate one hundred per cent of the cost to the plaintiff, cannot be declared reasonable or unreasonable under all of the circumstances judicially, unless the defendant's legislative body sets forth in the body of its enactment its considered findings. In other words, the subjective findings of the legislative body enacting the ordinance, not the objective findings of the tribunal confronted with the responsibility of testing the reasonableness of those findings, are crucial.

Previously in its opinion the court had outlined the sort of considerations pertinent to such a determination:

> Proper consideration in deciding such reasonable relation are: equity, benefit, degree of danger caused by the plaintiff, and what is generally, under comparable circumstances, considered to be reasonable by courts and governmental agencies. [Citing *City of Gainesville* v. *Southern Railway Company*, 423 F.2d 588, 590 (5th Cir. 1970)].

The court stated that its purpose in granting the motion and keeping in effect a temporary restraining order was to allow "compliance within a reasonable time by the defendant with the sense of this opinion," so that the

city might make a determination as to whether the requirements of due process and equal protection had been met. The city's legislative body then passed Ordinance Number 1813, amending and supplementing Ordinance Number 1764. Southern renewed its application for relief and the city moved for summary judgment. Again relying on *City of Gainesville* and detailing the factors declared therein to be relevant to such determinations, the district court held:

> The stipulated facts and exhibits now demonstrate by a preponderance of the evidence that the aforementioned Ordinance Number 1813 of the defendant City of Morristown does not constitute an abuse of its police power; that the traffic controls ordered to be installed are reasonably necessary, and it is reasonable for the City of Morristown to require the plaintiff Southern Railway Company to bear the entire cost of the installation and maintenance of signals at the grade crossings on Fairmont Street, High Street, and Industrial Avenue.

The findings of the district court are set forth in the appendix.

We agree with the district court's determination that under the circumstances the City of Morristown acted neither arbitrarily nor unreasonably in allocating to the Southern Railway Company one hundred percent of the cost of installing and maintaining the safety devices. Because of the force and persuasiveness with which Southern advances its position, it is well to review the applicable legal principles and to focus on the particular factual situation before us.

Southern relies primarily on *Nashville C. and St. L. Ry.* v. *Walters*, 294 U.S. 405 (1935). There the court, in a typically careful and detailed opinion by Mr. Justice Brandeis, found arbitrary and unreasonable the application of a state statute authorizing the State Highway

Commission to require the separation of grades when a state highway crosses a railroad and when the Commission finds it necessary for the protection of travelers. As the court stated, "without conferring upon the Commission any discretion as to the proportion of the cost to be borne by the railroad, [the statute] require[d] the latter to pay in every case, one-half of the total cost of the separation of grades." Southern correctly sees the *Nashville* case as highlighting an evolutionary shift by both courts and legislatures away from mechanical application of the maxim, "He who creates and maintains upon his premises a condition dangerous to others is under an obligation to guard it and protect it so that injuries to third persons may not result therefrom."[1] And, indeed, appellant is correct in stating that: "The Supreme Court thus established—more than 35 years ago—that with respect to grade crossings, no less than in other areas, there are considerations of equity, reasonableness, and beneficial interest which apply to the exercise of the police power," citing *Nashville C. & St. L. Ry.* v. *Walters, supra.*

However, Mr. Justice Brandeis also made it quite clear that, while the 50% allocation of costs then before the court was unreasonable and arbitrary in light of the "special facts" of the case, an allocation of the entire cost would often be perfectly fair and reasonable. He stated:

> It (the Railway) concedes that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State *may*, under the police power, *impose upon a railroad the whole cost of eliminating a grade crossing,*

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[1] Cf. *Continental Improvement Co.* v. *Stead*, 95 U.S. 161 (1877). Summarizing the early cases, a Note in the Harvard Law Review in 1913 points out that "since the railroad and not the highway use creates the danger, it is not unreasonable that the former rather than the latter should bear the cost of removing it." 26 Harv. L. Rev. 169, 170.

> or such part thereof as it deems *necessary*. The claim of unconstitutionality *rests wholly upon the special facts* here shown. *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, at 413. Cf. cases cited id. n. 3 at 413 and *Erie R.R. Co.* v. *Board of Public Utility*, 254 U.S. 394 (1921). (Emphasis added)

Three different sets of factors, none of which are present in the instant case, seem to have led to the result reached by the court in the *Nashville* case. First, as noted above, the act whose application was questioned was a state statute which allocated to the railroad 50% of the cost of the improvement in all cases which fell into a broad class, not allowing the Highway Commission any discretion to allocate cost among the parties in a manner fair and reasonable in light of all the circumstances. This, in itself, would seem to be the essence of arbitrariness.

Second, the Tennessee Supreme Court, in reversing the trial court and approving the application of the statute did no consider the circumstances pertinent to the allocation of costs.

Third, the facts surrounding the imposition of costs in *Nashville* strongly supported a finding of arbitrariness and unreasonableness. This was pointed out by the Supreme Court in *Atchison R. Co.* v. *Pub. Util. Comm'n.*, 346 U.S. 346 (1953), where it stated:

> The grade separation ordered in the *Nashville* case was located in the rural community of Lexington, Tennessee, which had a population in 1910 of 1497, in 1920 of 1792, and in 1930 of 1823. The improvement was not required to meet the transportation needs of Lexington and was being constructed without regard to that community's growth or to considerations of public safety and convenience resulting from such growth. The highway under improvement was part

> of the State highway system and the grade was to be removed primarily as part of economic and engineering planning and to qualify the improvement of the highway for federal aid. 346 U.S. at 353.

As in the *Atchison* case, the "special facts" of the case before us paint a picture different from *Nashville.*

In the *Atchison* case it appears from the opinion that the railroad relied on *Nashville, supra,* in much the same fashion as Southern does here. Before distinguishing the facts before it from those of the *Nashville* case the court stated:

> The appellants rely heavily on the *Nashville* case, supra, but that decision is in accord with the long-established rule which we here follow and the Commission applied. As the Court said in the *Nashville* case: "The claim of unconstitutionality rests wholly upon the special facts here shown." 346 U.S. at 353.

In the preceding paragraph the court had stated the applicable rule thusly:

> . . . this Court has consistently held that in the exercise of the police power, the cost of such improvements *may be* allocated all to the railroads (citing cases). There is the proper limitation that such allocation of costs must be fair and reasonable. 346 U.S. at 352.

In the *City of Gainesville* case, *supra,* relied on by the appellant, the Fifth Circuit was presented a case in which the trial court had not based its approval of allocation of costs to Southern on a careful consideration of all the circumstances. The court of appeals found that the court below had thereby failed to perform its function of judicial review of legislative enactments in a manner consistent with the pronouncements of the *Nashville* case and reversed and remanded for a determination based on "all of the circum-

stances" surrounding the allocation.[2] In so doing Judge Tuttle gave the district court guidance as to considerations which should weigh in such a determination. He thus stated:

> Southern does not argue that the cost should be allocated according to benefit as was argued in *Atchison* and *West Palm Beach*, but that there should be several considerations, equity, benefit, degree of danger caused by Southern and what is generally, under comparable circumstances, considered to be reasonable by courts and government agencies. 423 F.2d at 591.

The factual circumstances surrounding the improvement and its allocation of its cost to Southern do not suggest that Southern has been dealt with arbitrarily or in unreasonable fashion: The findings of the district court show that the crossings in question were hazardous and that the safety devices are necessary to protect the safety of both rail and highway travelers; that accidents at these

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[2] Judge Tuttle made quite clear the nature and scope of the *City of Gainesville, supra*, holding:

> We do not hold that a municipality or a state does not have full power to require a railroad company to bear all the cost for a grade crossing safety device, nor that the Gainesville ordinance is unconstitutional per se because it is an unreasonable and arbitrary exercise by the City of Gainesville of its police power, nor that benefit should be the sole measure of the allocation of cost. We find here that the district court did not make a finding as to the reasonableness of the *allocation of costs* in installing and maintaining the signal devices as to this particular case, a determination which might or might not make the application of the ordinance unconstitutional. Therefore, we conclude that we must remand the case to the district court for a determination as to the reasonableness under all of the circumstances, of the allocation of one hundred percent of the cost to Southern Railway. *City of Gainesville* v. *Southern Railway Company, supra*, at 591.

crossings have resulted in considerable expense to Southern; that the improvement was necessary for public safety and convenience in light of the community's growth; and that the city had recently constructed an overpass in connection with a new east-west traffic artery at a cost of $200,000 which it bore entirely.

We conclude that the district court acted properly in granting summary judgment in favor of the City of Morristown and that its judgment should be and it is hereby

Affirmed.

APPENDIX

Judge Neese stated in his findings:

The elements of equity, benefit, and degree of danger caused by Southern's movement of its trains through the City of Morristown are set forth as follows:

Of the 27% of the local crossings which are already electrically controlled, the plaintiff Southern Railway installed such signals and maintains them at its own expense. If electrical signals were installed at Fairmont Street, High Street, and Industrial Avenue, still only 36% of the 33 crossings within the City of Morristown would be electrically signalled. High Street and Fairmont Street are main north-south arteries feeding into a recently completed large Urban Renewal Project, which project includes a new city-county high school. A June, 1969 traffic count showed that Fairmont Street averaged 4,200 vehicles over an 11½ hour period from 6:00 a.m. to 5:30 p.m.; that High Street averaged 3,668 vehicles over the same period; and that Industrial Boulevard averaged 1,579 over the same period. The figures for Industrial Boulevard are unrealistic for current figures, as the crossing at Industrial Avenue is the main access road to the Morristown Industrial Park which now has 9 industries

with approximately 2,000 employees traveling to and from the area each day and which has recently led to heavy congested traffic, particularly at shift changes. Both the Fairmont Street and High Street crossings are blind crossings. At Fairmont, a driver traveling south has his view blocked to the west by a business building as he approaches the railroad tracks until he is a few feet from said tracks. A north-bound driver has his view blocked to the west by freight cars parked on a siding which serves Gluck Brothers, a local furniture manufacturer. At High Street, southbound traffic has its view to the west blocked by a filling station situated near the south of said tracks and north-bound traffic has its view blocked by a business building. The total cost of installing automatic signals at the three crossings contemplated would be $50,700.00 with an annual maintenance charge of $3,600.00. In connection with a new east-west traffic artery in the city, an overpass was constructed by the city at a cost of $200,000.00, no part of which was borne by Southern Railway Company. In recent years there have been five accidents at the Fairmont Street crossing and five at the High Street crossing. Said accidents have resulted in payments by the Southern Railway Company of $102,281.05, with an appealed judgment currently pending before the Tennessee Supreme Court of $350,000.00. The $50,700.00 cost of installation is $149,300.00 less than the $200,000.00 cost to the city of the recently completed overpass and is $51,581.05 less than the $102,281.05 that Southern has paid out in judgments for accidents at said intersections.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

Civil No. 2357

SOUTHERN RAILWAY COMPANY, *Plaintiff*

v.

CITY OF MORRISTOWN, *Defendant*

Memorandum Opinion and Order

(Filed June 30, 1970)

This is a diversity action, 28 U.S.C. §§ 1332 (a)(1), (c), by a railroad carrier, seeking a declaratory judgment, that a certain ordinance enacted by the defendant municipality is invalid. 28 U.S.C. § 2201. With the consent of the defendant, against which it is directed, Rule 65 (b), Federal Rules of Civil Procedure, an order restraining temporarily the defendant's enforcement of the provisions of the ordinance at issue has been extended until the final adjudication of the issues herein.

The facts essential to this consideration are: a main line of the plaintiff's railroad tracks bisects the city of Morristown, Tennessee. The legislative body of the defendant municipality enacted on January 7, 1969 its ordinance no. 1575, which requires the plaintiff to install and operate entirely at its expense automatic signal devices and crossing gates at three of the grade-crossing intersections of said main line with three respective streets of such municipality. The reason and motivation for such enactment were solely for considerations of the health, safety and welfare of the people affected. Basically, the plaintiff claims, *inter alia*, that the ordinance is an abuse of the defendant's exercise of its police power, that the traffic controls ordered are not reasonably necessary, and that it is unreasonable for the defendant to require the plaintiff to bear the entire cost of the installation and maintenance of such signals.

It is clear under the substantive law of Tennessee, which is applicable hereto, and apparently unquestioned, that the defendant municipality had and has the power, at least by implication, to require the protective devices to be installed and maintained at street-railway intersections where they are reasonably needed, and that the ordinance under consideration has a reasonable and substantial relationship to the promotion of the health, safety and comfort of the general public. *Southern Railway Company* v. *City of Knoxville* (1968), 221 Tenn. 232, 442 S.W. (2d) 619, 622, certiorari denied (1970), 396 U.S. 1002, 90 S. Ct. 551, 24 L. Ed. (2d) 494. As conceded by the Tennessee Supreme Court therein

> * * * there could be a case arising from a particular set of facts where it would be reasonable to charge only a part of a crossing to a railroad, and an ordinance requiring all the cost [to] be charged to a railroad would be void as applied to that particular case, but this would not result in making the ordinance void per se but only as to a particular case.

Ibid., 442 S.W. (2d) at 624. "* * * [W]hen particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. * * *" *Nashville, C. & St. L. Ry.* v. *Walters* (1935), 294 U.S. 405, 429, 55 S. Ct. 486, 495 [4], 79 L. Ed. 949. Proper considerations in deciding such reasonable relation are: equity, benefit, degree of danger caused by the plaintiff, and what is generally, under comparable circumstances, considered to be reasonable by courts and governmental agencies. *City of Gainesville* v. *Southern Railway Company*, C.A. 5th (1970), 423 F. (2d) 588, 590 [3].

It was considered by Court and all counsel that there could be a disposition of this lawsuit on its merits under the stipulation of facts filed herein. However, a careful

study of the factors to be considered, *supra,* in the light of the stipulated facts, discloses that such an adjudication cannot be made intelligently by the Court with the record in the present posture. That being the situation presented, the Court must fashion some order which will tend to produce a record herein which will enable the Court to administer justice between the adversary parties, unless additional facts are stipulated which renders this possible.

Although there is an implication in the *Gainesville case, ibid.,* [4] that the trial court is to make such findings, this Court is of the opinion that, (unless the gaps in the stipulated facts are supplied adequately) the factual considerations, which prompted the legislative body to allocate one hundred per cent of the cost to the plaintiff, cannot be declared reasonable or unreasonable under all of the circumstances judicially, unless the defendant's legislative body sets forth in the body of its enactment its considered findings. In other words, the subjective findings of the legislative body enacting the ordinance, not the objective findings of the tribunal confronted with the responsibility of testing the reasonableness of those findings, are crucial.

As both parties have moved for summary judgments, Rules 56 (a), (b), Federal Rules of Civil Procedure, solely for the purpose of allowing the defendant's legislative body time in which to include its considered findings as a part of the ordinance it has passed, such motion of the plaintiff hereby is GRANTED, that of the defendant hereby is DENIED, and the temporary restraining order will remain in effect until compliance within a reasonable time by the defendant with the sense of this opinion.

ENTER:

/s/ C. G. NEESE
C. G. Neese
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

Civil No. 2357

SOUTHERN RAILWAY COMPANY, *Plaintiff*

v.

CITY OF MORRISTOWN, *Defendant*

Memorandum Opinion

(Filed November 18, 1970)

Pursuant to the Court's order of June 30, 1970, the defendant City of Morristown enacted its ordinance no. 1813, which amends and supplements its order no. 1575, to which there was advertence herein earlier by the Court. The defendant has reinstituted its motion for a summary judgment, Rule 56 (b), Federal Rules of Civil Procedure, and the plaintiff has renewed its application for relief. The judgment sought by the defendant will be rendered forthwith, the pleadings, exhibits and stipulations on file showing that there is no genuine issue of material fact extant between the parties, and that the defendant is entitled to a judgment as a matter of law. Rule 56 (c), Federal Rules of Civil Procedure.

The amendatory and supplemented ordinance referred to reflects that the public improvements at certain of its railroad grade crossings were instituted by the City of Morristown "* * *. to meet the local transportation needs and further safety and convenience, made necessary by the rapid growth of the [community]. In such circumstances, [the Supreme] Court has consistently held that in the exercise of the police power, the cost of such improvements *may be* allocated all to the railroads. * * * There is the proper limitation that such allocation must be fair and reasonable. * * *" *Atchison, Topeka & S. F. R. Co.* v. *Public Util. Com.* (1953), 346 U.S. 346, 352, 74 S. Ct. 92, 98 L. Ed. 51, 60 (headnote 4). "* * * There should be several considerations, equity, benefit, degree of danger caused by Southern, and what is generally, under

comparable circumstances, considered to be reasonable by courts and governmental agencies. It is clear from Atchison, that these are proper considerations. The elements of reasonableness and fairness *in the allocation of costs* in addition to the *requirement of installing* the signalling device[s] * * * must be considered by the Court. * * * " *City of Gainesville v. Southern Railway Company*, C.A. 5th (1970), 423 F. (2d) 588, 591[3].

The stipulated facts and exhibits now demonstrate by a preponderance of the evidence that the aforementioned ordinance no. 1813 of the defendant City of Morristown does not constitute an abuse of its police power, that the traffic controls ordered to be installed are reasonably necessary, and that it is reasonable for the City of Morristown to require the plaintiff Southern Railway Company to bear the entire cost of the installation and maintenance of signals at the grade crossings on Fairmont Street, High Street, and Industrial Avenue. The elements of equity, benefit, and degree of danger caused by Southern's movement of its trains through the City of Morristown are set forth as follows:

Of the 27% of the local crossings which are already electrically controlled, the plaintiff Southern Railway installed such signals and maintains them at its own expense. If electrical signals were installed at Fairmont Street, High Street, and Industrial Avenue, still only 36% of the 33 crossings within the City of Morristown would be electrically signalled. High Street and Fairmont Streets are main north-south arteries feeding into a recently completed large Urban Renewal Project, which project includes a new city-county high school. A June, 1969 traffic count showed that Fairmont Street averaged 4,200 vehicles over an 11½ hour period from 6:00 a.m. to 5:30 p.m.; that High Street averaged 3,668 vehicles over the same period; and that Industrial Boulevard averaged 1,579 over the same period. The figures for Industrial Boulevard are unrealistic for current figures, as the crossing at Industrial Avenue is the main access road to the Morristown Industrial Park which now has 9 industries with approx-

imately 2,000 employees traveling to and from the area each day and which has recently led to heavy congested traffic, particularly at shift changes. Both the Fairmont Street and High Street crossings are blind crossings. At Fairmont, a driver traveling south has his view blocked to the west by a business building as he approaches the railroad tracks until he is a few feet from said tracks. A north-bound driver has his view blocked to the west by freight cars parked on a siding which serves Gluck Brothers, a local furniture manufacturer. At High Street, south-bound traffic has its view to the west blocked by a filling station situated near the south of said tracks and north-bound traffic has its view blocked by a business building. The total cost of installing automatic signals at the three crossings contemplated would be $50,700.00 with an annual maintenance charge of $3,600.00. In connection with a new east-west traffic artery in the city, an overpass was constructed by the city at a cost of $200,000.00, no part of which was borne by Southern Railway Company. In recent years there have been five accidents at the Fairmont Street crossing and five at the High Street crossing. Said accidents have resulted in payments by the Southern Railway Company of $102,281.05, with an appealed judgment currently pending before the Tennessee Supreme Court of $350,000.00. The $50,700.00 cost of installation is $149,300.00 less than the $200,000.00 cost to the city of the recently completed overpass and is $51,581.05 less than the $102,281.05 that Southern has paid out in judgments for accidents at said intersections.

Thus, ordinance no. 1575, as modified by ordinance no. 1813, of the City of Morristown, hereby is declared to be valid. The motion of the defendant for a summary judgment hereby is GRANTED. The plaintiff hereby is DENIED all relief. Rule 58, Federal Rules of Civil Procedure.

FILE:

/s/ C. G. NEESE
C. G. Neese
United States District Judge

[Filed September 22, 1971]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1032

SOUTHERN RAILWAY COMPANY, *Plaintiff-Appellant*,

v.

CITY OF MORRISTOWN, *Defendant-Appellee*.

BEFORE: PHILLIPS, Chief Judge, McCREE and MILLER, Circuit Judges.

Judgment

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue, out of said District Court.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk

Issued as Mandate:

A True Copy.

Ordinance No. 1813, Being an Ordinance To Amend Ordinance No. 1764, and Being an Ordinance To Require All Railroads Having Tracks Intersecting With Industrial Avenue, Fairmont Avenue, or High Street and/or Operating Trains or Locomotives Across Same in the City of Morristown To Erect and Maintain Automatic Electric Signal Devices and Cross Gates at Said Intersections, and To Repeal All Ordinances or Parts of Ordinances in Conflict Herewith

SECTION I. BE IT ORDAINED BY THE MAYOR AND ALDERMEN OF THE CITY OF MORRISTOWN, that because of the many train-automobile accidents within the City and increased automotive traffic at certain street and railroad intersections, study and consideration has been given to the practicality and feasibility of requiring the placement of safety devices at certain railway/street intersections within the City, with the following determinations and findings being made by said Mayor and Aldermen, to-wit:

1. There are some thirty-three (33) railway/street intersections within the corporate boundaries of the City of Morristown, of these there being nineteen (19) so called main line crossings. Of the nineteen (19) main line crossings, nine are electrically signalled, with either automatic gates, lights and bells, or automatic lights and bells. These said electrical signal devices were installed and are maintained at the sole expense of the Southern Railway Company. None of the other crossings within the City have electrical signal devices, so it is that some 27% of local crossings are electrically controlled.

2. Six regularly scheduled trains pass through Morristown on said main line in an average twenty-four (24) hour period, and there is additional train traffic on said main line, due to switching operations.

3. The estimated cost of automatic gates, lights and bells at each crossing is $16,900.00, with an estimated annual maintenance cost of $1,200.00.

4. At the direction of City Council a study and report by the City Administrator and City Attorney was made of the various crossings within the City, with the recommendation that six (6) crossings should be electrically signalled, viz: Pearce Drive, Economy Road, East Tennessee Boulevard, Fairmont Street, High Street, and Industrial Avenue, and while the Council does find that such would be highly desirable, the pressing need at the present time is directed toward the three crossings at Fairmont Street, High Street, and Industrial Avenue.

5. A traffic count made between the hours of 6:00 A.M. and 5:30 P.M. in June, 1969, revealed 1,579 vehicles over Industrial Boulevard, 3,668 vehicles over High Street, and 4,200 vehicles over Fairmont Avenue.

6. Within the two years preceding the passage of Ordinance No. 1764, a large Urban Renewal Project was completed in the City, which affected the residential area lying south of Southern Railway main line tracks, and much of same adjacent to said railway right of way, in such a manner as to remove much of said residential area and concentrate same in a public housing development on the southwest side of the City. High Street and Fairmont Street are main north-south arteries feeding into this project area.

7. A new City-County High School has been recently completed, which is within the same general area of the housing project, and is also served by High Street and Fairmont Street for north-south traffic.

8. The said Urban Renewal Project was financed by funds flowing frtm the Federal, State and City governments, and represented an expenditure of several million dollars.

9. As a further result of the residential area removal adjacent to the railway tracks, two railway/street

intersections were eliminated and closed, being Dice Street and Mill Street, both of which were controlled by automatic electric signals.

10. Shortly prior to the passage of Ordinance No. 1764, a new east-west traffic artery was constructed in the City at a cost of $700,000.00, a portion of which, $150,000.00, was borne by the State and the balance by the City. In conjunction with this improvement, the City constructed an overpass over the Southern Railway tracks, at an additional cost of $200,000.00.

11. At the Fairmont-Street crossing, a motor vehicle operator travelling south has his view to the west blocked by a business building as he approaches the railway tracks, until he is within a very few feet of said tracks. The northbound motorist at Fairmont often times has his view to the west blocked by railway freight cars parked on a siding or spur track which serves Gluck-Brothers Industries, Incorporated, a local furniture manufacturer.

12. At High Street, southbound traffic has its view to the west blocked by a filling station situated near the south side of the tracks, and northbound traffic has its view to the west blocked by a business building, as it approached the tracks.

13. The crossing at Industrial Avenue is the main access road to the Morristown Industrial Park, which is of recent origin. The Industrial Park now has nine (9) industries established therein, with approximately 2000 employees travelling to and from the area each day. As of this time, only one car-train collision has occurred at this crossing, however, because of the recent origin of the Industrial Park, there has been relatively little traffic across said crossing until recent months, which has now become quite heavy, particularly at shift changes in the industrial plants.

14. In the past few years, there have been five (5) accidents at High Street crossing, and five (5) accidents at the Fairmont Street crossing. These accidents have resulted in payments by the railway of $102,281.05, and an appealed judgment is pending before the Tennessee Supreme Court in the amount of $350,000.00. Part of these accidents, of course, involved very serious personal injuries.

15. During the period of 1960 to 1970, vehicle registration in Hamblen County increased from 9,500 to 25,500.

16. The railway trains claim virtually absolute right of way under existing law over intersecting vehicular traffic at crossings.

SECTION II. BE IT FURTHER ORDAINED that on or before ninety (90) days from the final passage of this ordinance that any railroad having tracks intersecting with Industrial Avenue, Fairmont Avenue, or High Street and operating trains across same in the City of Morristown shall have in operation automatic electric signal devices and crossing gates. All such signal devices and crossing gates shall be so designed and constructed as to give ample warning of the approach of trains thereto and once activated shall remain in operation until the crossing is completely cleared and traffic on the intersecting street can proceed across the tracks with reasonable safety and such devices and gates shall be of a type approved by the City Administrator of the City of Morristown, and such railroads shall operate and maintain same at no cost to the City of Morristown, in such manner as is approved by the said City Administrator.

SECTION III. BE IT FURTHER ORDAINED that any ordinances in conflict with this ordinance be and the same hereby are repealed to the extent of such conflict.

SECTION IV. BE IT FURTHER ORDAINED that if any provision of this ordinance or the application thereof to any person, corporation or circumstance is held invalid, such invalidity shall not affect other provisions or application of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

SECTION V. This ordinance shall take effect immediately upon its final passage, the public safety and welfare requiring it.

Passed on first reading the 21 day of July, 1970.

.....
Mayor

Attest:

/s/ James B. Gratz
Recorder

Passed on second and final reading the ..... day of ....., 1970.

.....
Mayor

Attest:

.....
Recorder

Relevant State Statutes

Alabama, Acts 1927, No. 347, art. I, § 43, p. 361; Ala. Code tit. 23, § 35 (Supp. 1969) (costs allocated).

Arizona, Sess. Laws 1912, ch. 90, § 43, p. 526; Ariz. Rev. Stat. Ann. § 40-337 (1956) (costs allocated). Sess. Laws 1959, ch. 128, § 1, p. 257; Ariz. Rev. Stat. Ann. § 40-337.01 (Supp. 1970) (costs of protective devices allocated).

Arkansas, Acts 1929, No. 65, § 59, p. 331; Ark. Stat. Ann. § 76-517 (1957) (costs allocated).

California, Stat. 1915, ch. 91, § 43, p. 137; Cal. Pub. Util. Code § 1202 (Deering 1961) (costs allocated). The railroads' share of costs for crossing elimination initiated by a public agency was limited in 1957 to 10 per cent of the costs attributable to the railroads' presence plus the savings due to the elimination or reduction of maintenance costs and protective costs, capitalized at 5 per cent per annum. (Stat. 1957, ch. 2091, § 1, p. 3713). If the project is undertaken to increase highway capacity, the railroads' share is set at 10 per cent (Stat. 1957, ch. 2091, § 1, p. 3713; Cal. Pub. Util. Code § 1202.5 (Deering 1961).

Colorado, Laws 1917, ch. 109, § 1, p. 415; Colo. Rev. Stat. Ann. § 115-4-6(2)(a) (Supp. 1969) (costs allocated). Laws 1965, ch. 236, § 1, p. 926; Colo. Rev. Stat. Ann. § 115-4-6 (2)(b) (Supp. 1969) (railroad pays 10 per cent of cost of protective devices).

Connecticut, Acts 1876, H.B. No. 140, § 1, p. 102; Acts 1877, H.B. No. 197, § 1, p. 152; Conn. Gen. Stat. Ann. § 16-100 (1958) (costs allocated). On state highways the portion allocated to the railroad cannot exceed 10 per cent (Acts 1957, No. 499, § 1, p. 709; Conn. Gen. Stat. Ann. § 16-104 (1958)).

Delaware, Laws 1917 (29 Del. Laws), ch. 63, § 6, p. 177; Del. Code Ann. tit. 17, § 708 (1953) (costs allocated). Laws 1925 (34 Del. Laws), ch. 80, § 1, p. 157; Del. Code Ann. tit. 17, § 710 (1953) (state bears the cost of protective devices).

Florida, Laws 1945, ch. 23078, §§ 1-3, p. 1254; Fla. Stat. Ann. § 338.21 (1968) (state shares costs).*

Georgia, Acts 1927, No. 376, §§ 6, 7, pp. 303, 304; Ga. Code Ann. §§ 95-1905, 95-1907 (1958) (costs allocated).

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* On February 1, 1971 the Florida Department of Transportation agreed to assume 50 per cent of the cost of maintenance of all new protective crossing devices. Reg. 46.02.

Idaho, Sess. Laws 1929, ch. 151, §§ 1, 3, pp. 275, 276; Idaho Code §§ 62-301, 303 (Supp. 1969) (costs allocated).

Illinois, Laws 1933, H.B. No. 555, § 1, p. 850; Ill. Rev. Stat. ch. 111-2/3, § 62 (Smith-Hurd 1966) (costs allocated).

Indiana, Acts 1913, ch. 182, § 4, p. 511 (costs allocated, 75 per cent to railroad). The railroads' share was reduced in 1939 to 20 per cent for elimination of existing grades; if an existing grade is not eliminated by the construction, the railroad pays nothing (Acts 1939, ch. 41, § 1, p. 167; Ind. Ann. Stat. § 55-1810 (Burns 1951). Allocation of the costs of protective devices was provided for in 1931 (Acts 1931, ch. 89, § 3, p. 256; Ind. Ann. Stat. § 55-2014 (Burns Supp. 1968)).

Iowa, Acts 1913 (35 Gen. Acts), ch. 162, § 1, p. 185; Iowa Code Ann. §§ 478.21-23 (Supp. 1970) (costs allocated). Acts 1953, ch. 215, § 1, p. 364; Iowa Code Ann. §§ 478.21-23 (Supp. 1970) (costs of protective devices allocated).

Kansas, Laws 1917, ch. 264, § 18, p. 371; Kan. Stat. Ann. §§ 68-414, 68-509 (1964) (costs allocated).

Kentucky, Acts 1926, ch. 194, § 6, p. 890 (costs allocated, 50 per cent to railroad). By 1958, the railroads' share had been reduced to a 10 per cent maximum (Acts 1958, ch. 78, § 1, p. 417; Ky. Rev. Stat. § 277.065 (1969)).

Louisiana, Acts 1924, No. 38, § 1, p. 61; La. Rev. Stat. § 33.3701 (1950) (costs allocated in municipalities). Acts 1966, No. 511, § 1, p. 1068; La. Rev. Stat. § 8:387 (Supp. 1970) (Department of Highways authorized to contribute up to 50 per cent of maintenance costs on protective devices).

Maine, Pub. Laws 1913, ch. 147, § 1, p. 190 (costs allocated). In 1931 the railroads' share was reduced from 65 per cent to a maximum of 50 per cent (Pub. Laws 1931, ch. 266, § 1, p. 300; Me. Rev. Stat. Ann. tit. 23, § 3411 (1964)). Pub. Laws 1949, ch. 408, p. 453; Me. Rev. Stat.

Ann. tit. 35, § 1187 (1946) (costs of protective devices allocated).

Maryland, Laws 1931, ch. 539, §§ 13, 15, pp. 1371, 1373 (costs allocated equally). In 1933 the railroads' share was reduced to 25 per cent (Laws 1933, ch. 223, § 1, p. 381; Md. Code Ann. art 89B, §§ 51, 53 (1957)).

Massachusetts, Acts 1890, ch. 428, § 3, p. 463 (costs allocated). In 1930 the railroads' share was reduced from 65 per cent to 50 per cent (Acts 1930, ch. 417, § 3, p. 530). The minimum contribution by the railroad was eliminated in 1937, and a benefits test substituted for apportioning costs (Acts 1937, ch. 357, § 1, p. 492; Mass. Gen. Laws ch. 159, § 70 (1970)). Acts 1965, ch. 886, § 1, p. 730; Mass. Gen. Laws, ch. 160, § 147 (1970) (costs of protective devices apportioned).

Michigan, Pub. Acts 1921, Act. No. 101, § 1, p. 221 (costs allocated, state's maximum share 25 per cent). In 1925, the state's maximum share was raised to 50 per cent (Pub. Acts 1925, Act No. 114, § 5, p. 156), and in 1939 a maximum limit of 15 per cent was set on the railroads' share (Pub. Acts 1939, Act No. 285, § 1, p. 553; Mich. Stat. Ann. § 22.765 (1970)). Pub. Acts 1937, Act. No. 295, § 1, p. 550; Mich. Stat. Ann. § 9.1423 (1970) (state bears costs of protective devices).

Minnesota, Laws 1923, ch. 134, § 2, p. 143 (costs allocated). An amendment in 1951 incorporated a benefits standard for allocation (Laws 1951, ch. 179, § 2, p. 246; Minn. Stat. Ann. § 219.40 (Supp. 1970)).

Mississippi, Laws 1930, ch. 47, § 17, p. 77; Miss. Code Ann. § 8039 (1942) (costs allocated).

Missouri, Laws 1913, S.B. No. 1, art. II, § 50, p. 589. A maximum of 50 per cent on the state's share imposed in 1925 (Laws 1925, H.B. No. 726, § 1, p. 322) was eliminated in 1963 (Laws 1963, S.B. No. 303, § 1, p. 501; Mo. Rev. Stat. § 389.640.2 (Supp. 1970)).

Montana, Laws 1919, ch. 148, § 7, p. 148; Mont. Rev. Codes Ann. § 72-707 (1947) (costs may be allocated).

Nebraska, Sess. Laws 1925, ch. 163, §§ 1, 2, pp. 425, 426; Neb. Rev. Stat. §§ 75-415, 416 (1966) (costs allocated). Sess. Laws 1961, ch. 359, §§ 1, 2, p. 1126. Grade Crossing Protection Fund created in state treasury, with 40 per cent of costs allocated to railroads. In 1965 the railroads' share was reduced to 25 per cent (Laws 1965, ch. 220, § 1, p. 641; Neb. Rev. Stat. § 39-7.137 (Supp. 1968)).

Nevada, Sess. Laws 1919, ch. 109, § 18A, p. 206; Nev. Rev. Stat. § 704.300 (1967) (costs allocated).

New Hampshire, Laws 1937, ch. 123, § 1, p. 171; Laws 1951, ch. 203, § 10, p. 497; N.H. Rev. Stat. Ann. §§ 373.2, 373.3, 373.10 (1966) (costs allocated).

New Jersey, Laws 1929, ch. 88, § 2, p. 138 (costs allocated). In 1947 the railroads' share was reduced to 15 per cent (Laws 1947, ch. 178, §§ 3, 4, p. 818), and in 1965, to 5 per cent (Laws 1965, ch. 185, § 2, p. 836; N.J. Rev. Stat. § 48:12.70 (1969)). In 1960, costs of protection devices were allocated, with railroads' share fixed at 15 per cent. Laws 1960, ch. 152, § 1, p. 681. In 1967 the railroads' share was reduced to 5 per cent (Laws 1967, ch. 191, § 1, p. 738; N.J. Rev. Stat. § 48:12-49.1 (1969)).

New Mexico, Laws 1929, ch. 97, § 3, p. 193 (costs allocated equally). In 1949 the railroads' share was reduced to a 10 per cent maximum (Laws 1949, ch. 118, § 1, p. 278; N.M. Stat. Ann. § 69-3-40 (1953)).

New York, Constitution Art. VII, Sec. 14 (1925) (costs allocated, railroads' share 50 per cent). Amended in 1938 to reduce railroads' maximum share to 15 per cent. Laws 1956, ch. 827, § 1, p. 1783; N.Y.R.R. Law § 53 (Supp. 1970) (State pays half of installation costs of crossing devices).

North Carolina, Sess. Laws 1923, ch. 160, § 5, p. 460 (costs allocated). In 1959, railroads' share of cost of

crossing devices was reduced to maximum of 10 per cent. Sess. Laws 1959, ch. 1216, § 1, p. 1371; N.C. Gen. Stat. § 136-20.

North Dakota, Sess. Laws 1925, ch. 181, §§ 10, 11, p. 226; N.D. Cent. Code §§ 24-09-10, 24-09-11 (1970). Sess. Laws 1963, ch. 218, § 1, p. 357; N.D. Cent. Code § 24-09-08.1 (1970) (costs of protective devices allocated).

Ohio, Laws 1893 (90 Ohio Laws) H.B. No. 1560, § 5, p. 361 (costs allocated, railroads' share 65 per cent). In 1939 the railroads' share was reduced to 15 per cent (Laws 1939 (118 Ohio Laws) H.B. No. 334, § 1, p. 334; Ohio Rev. Code Ann. § 4947.05 (Page 1954)). Laws 1961 (129 Ohio Laws) S.B. No. 158, § 1, p. 313; Ohio Rev. Code Ann. § 4907.49 (Page Supp. 1967) (costs of protective devices allocated).

Oklahoma, Laws 1919, ch. 53, § 2, p. 88; Okla. Stat. Ann. tit. 17, § 82 (Supp. 1970) (costs allocated). Laws 1965, ch. 388, § 1, p. 674; Okla. Stat. Ann. tit. 17, § 86 (Supp. 1970) (between 10 per cent and 25 per cent of the costs of protective devices may be allocated to railroads).

Oregon, Laws 1917, ch. 228, § 4, p. 435. A 1927 provision requiring railroads to pay 50 per cent of costs (Laws 1927, ch. 304, § 2, p. 385) was eliminated in 1937 (Laws 1937, ch. 118, § 3, p. 154; Ore. Rev. Stat. §§ 763.030, 763.050 (1969)). Laws 1961, ch. 88, § 1, p. 73; Ore. Rev. Stat. § 763.170 (1969) (costs of protective devices allocated).

Pennsylvania, Pub. Laws 1913, No. 854, art. 5, § 12, p. 1408; Pa. Stat. Ann. tit. 66, § 1197 (Purdon 1959) (costs allocated).

Rhode Island, Gen. Laws 1896, ch. 187, § 44; R.I. Gen. Laws Ann. § 39-8-2 (1956) (costs allocated).

South Carolina, Stat. 1934, No. 634, § 4, p. 1057; S.C. Code Ann. § 58-816 (1962) (costs allocated).

South Dakota, Sess. Laws 1919, ch. 292, § 1, p. 340; Sess. Laws 1919, ch. 293, § 62, p. 412; S.D. Compiled Laws Ann. §§ 31-27-1, 31-27-5 (1967) (costs allocated).

Tennessee, Acts 1921, ch. 132, § 4, p. 357; Tenn. Code Ann. § 65-1114 (1955) (some costs allocated).

Utah, Laws 1917, ch. 47, art. 4, § 14, p. 153; Utah Code Ann. § 54-4-15 (1953) (costs allocated).

Vermont, *Laws* 1906, No. 125, § 1, p. 134 (costs allocated, with railroads' share a minimum of 65 per cent). In 1961 the law was amended to remove the minimum, and costs of protective devices were allocated (Laws 1961, No. 267, § 4, p. 409; Vt. Stat. Ann. tit. 30, § 1902 (1970)).

Virginia, Laws 1952, ch. 398, § 1, p. 682; Laws 1952, ch. 400, § 1, p. 684; Laws 1954, ch. 218, § 1, p. 238; Va. Code Ann. §§ 56.366.1, 56.366.2, 56.406.1, 56.406.2 (1969) (costs allocated).

Washington, Laws 1913, ch. 30, § 6B, p. 80; Wash. Rev. Code Ann. § 81.53.110 (1962) (costs allocated). Laws 1959, ch. 283, § 3, p. 1358; Wash. Rev. Code Ann. § 81.53.260 (1962) (costs of protective devices allocated).

West Virginia, Ex. Sess. Laws 1933, ch. 40, art. IV § 14, p. 277 (costs allocated equally). In 1947 the railroads' share was reduced to 10 per cent (Sess. Laws 1947, ch. 141, § 1, p. 515; W. Va. Code Ann. § 17-4-14 (1966)).

Wisconsin, Laws 1909, ch. 540, p. 722; Laws 1923, ch. 108, § 163, p. 163; Wisc. Stat. Ann. §§ 195.29, 84.05 (West Supp. 1970 (costs allocated)). Laws 1949, ch. 643, p. 633 (costs of protective devices allocated). The state's maximum share was raised in 1963 from 50 per cent to 70 per cent (Laws 1963, ch. 358, § 1, p. 615; Wisc. Stat. Ann. § 195.28 (West Supp. 1970).

Wyoming, Laws 1915, ch. 146, § 40, p. 219; Wyo. Stat. Ann. § 37-64 (1957) (costs allocated). Laws 1963, ch. 138, § 3, p. 219; Wyo. Stat. Ann. § 37.235.3 (Supp. 1969) (costs of protective devices allocated, railroads' share maximum of 10 per cent).